FILED: May 21, 2019

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6151
(0:17-cv-02784-RBH)

GREGORY GREEN

Petitioner - Appellant

v.

DONALD BECKWITH, Warden

Respondent - Appellee

JUDGMENT

In accordance with the decision of this court, a certificate of appealability is denied and the appeal is dismissed.

This judgment shall take effect upon issuance of this court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Appendix A

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 19-6151

GREGORY GREEN,

Petitioner - Appellant,

v.

DONALD BECKWITH, Warden,

Respondent - Appellee.

Appeal from the United States District Court for the District of South Carolina, at Rock Hill. R. Bryan Harwell, Chief District Judge. (0:17-cv-02784-RBH)

Submitted: May 16, 2019

Decided: May 21, 2019

Before DIAZ and THACKER, Circuit Judges, and HAMILTON, Senior Circuit Judge.

Dismissed by unpublished per curiam opinion.

Gregory Green, Appellant Pro Se.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Gregory Green seeks to appeal the district court's order accepting the recommendation of the magistrate judge and denying relief on Green's 28 U.S.C. § 2254 (2012) petition. The order is not appealable unless a circuit justice or judge issues a certificate of appealability. 28 U.S.C. § 2253(c)(1)(A) (2012). A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2) (2012). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating that reasonable jurists would find that the district court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on procedural grounds, the prisoner must demonstrate both that the dispositive procedural ruling is debatable, and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85.

We have independently reviewed the record and conclude that Green has not made the requisite showing. Accordingly, we deny Green's motion for a certificate of appealability, deny as moot his motion for bond or release pending appeal, and dismiss the appeal. We dispense with oral argument because the facts and legal contentions are adequately presented in the materials before this court and argument would not aid the decisional process.

DISMISSED

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
ROCK HILL DIVISION

Gregory Green, Petitioner, v. Donald Beckwith, Warden, Respondent.	)	Civil Action No.: 0:17-cv-02784-RBH **ORDER**

Petitioner, Gregory Green, a state prisoner proceeding *pro se*, filed the current petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 13, 2017. *See* [ECF No. 1]. Pending before the Court is Respondent's motion for summary judgment [ECF No. 23] pursuant to Rule 56 of the Federal Rules of Civil Procedure.

This matter is before the Court with the Report and Recommendation (R & R) of United States Magistrate Judge Paige J. Gossett.[1] [ECF No. 37]. The Magistrate Judge recommended granting the Respondent's motion for summary judgment and dismissing Petitioner's petition with prejudice. For the reasons stated below, the Court adopts the Magistrate Judge's R & R, grants Respondent's motion for summary judgment, and dismisses Petitioner's § 2254 petition with prejudice.

Facts and Procedural History

On November 21, 2013, Petitioner was indicted by an Horry County Grand Jury for trafficking in heroin, four to fourteen grams, *second offense*. On May 29, 2014, Petitioner pled guilty to trafficking in heroin, four to fourteen grams, *first offense*. Petitioner was sentenced to ten

[1] This matter was referred to the Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and Local Rule 73.02(B)(2)(c) for the District of South Carolina.

Appendix B

years in prison and a $50,000.00 fine. Petitioner did not file a direct appeal.

On November 17, 2014, Petitioner filed an application for post-conviction relief ("PCR") in the Horry County Court of Common Pleas. Petitioner raised the following three issues in his PCR application:

1) Trafficking, first offense, is not a lesser included offense of trafficking, second offense;

2) Violation of notice requirement guaranteed by U.S. and S.C. constitution and statutes;

3) Breach of the plea agreement.

[PCR Application, ECF No. 24-1 at 25].

The PCR court denied and dismissed Petitioner's PCR application in an Order filed March 11, 2016. The PCR court found:

> Applicant has not established any constitutional violations or deprivations that would require this Court to grant his application. The record shows no prejudice to the Applicant, nor does it show any action by plea counsel that would be deficient under the terms provided by Strickland. Specifically, this Court finds that Applicant's argument regarding this not being a lesser included offense is without merit. The indictment is a notice document to advise a defendant of elements of a crime and advise him of what he must defend. This Court finds that Applicant was properly notified, and that plea counsel was not required to challenge the indictment. Plea counsel was not deficient and did not perform at a level that fell below prevailing professional norms. Even if he had, there is no evidence to show prejudice to this Applicant. Additionally, Applicant has failed to show that his guilty plea was anything other than knowingly, intelligently, and voluntarily entered, and has not shown that, but for the defects he alleges in his plea, he would have proceeded to trial. Therefore, this application for post-conviction relief must be denied and dismissed with prejudice.

[Order of Dismissal, ECF No. 24-1 at 70].

Petitioner appealed the PCR court's order by filing a petition for a writ of certiorari in the

South Carolina Supreme Court on October 24, 2016. [Petitioner for Writ of Certiorari, ECF No. 24-7]. Petitioner raised only one issue in his PCR appeal: "The PCR judge erred in failing to vacate petitioner's plea to trafficking in heroin, first offense, as an alleged lesser offense per his indictment on the offense of trafficking in heroin, second offense, because trafficking in heroin, first offense, is not a lesser offense of trafficking in heroin, second offense." *Id.* at 3. The South Carolina Court of Appeals denied the petition for a writ of certiorari on January 9, 2018.

Petitioner filed the instant pro se petition for writ of habeas corpus on October 13, 2017. Petitioner's raises three grounds for relief in his habeas petition. In ground one, Petitioner claims that under the elements test enunciated by the U.S. Supreme Court, S.C. Code Ann. § 44-53-370(e)(3)(a)(1) (*heroin trafficking - first offense*) is not a lesser included offense of S.C. Code Ann. § 44-53-370(e)(3)(a)(2) (*heroin trafficking - second offense*). In ground two, Petitioner contends he was deprived of sufficient notice of the charge to which he pled guilty in violation of the Due Process Clause of the 14th Amendment to the U.S. Constitution. In ground three, Petitioner contends the State breached the plea agreement, which violated the Due Process Clause of the 14th Amendment to the U.S. Constitution.

Legal Standards of Review

I. Review of the Magistrate Judge's Report & Recommendation

The Magistrate Judge makes only a recommendation to the Court. The recommendation has no presumptive weight. The responsibility to make a final determination remains with the Court. *Mathews v. Weber*, 423 U.S. 261, 270–71 (1976). The Court is charged with making a de novo determination of those portions of the report and recommendation to which specific objection is made, and the Court may accept, reject, or modify, in whole or in part, the recommendation of the

Magistrate Judge, or recommit the matter to the Magistrate Judge with instructions. 28 U.S.C. § 636(b)(1). The right to de novo review may be waived by the failure to file timely objections. *Orpiano v. Johnson*, 687 F.2d 44, 47 (4th Cir. 1982). The district court is obligated to conduct a de novo review of every portion of the Magistrate Judge's report to which objections have been filed. *Id.* However, the Court need not conduct a de novo review when a party makes only "general and conclusory objections that do not direct the [C]ourt to a specific error in the [M]agistrate's proposed findings and recommendations." *Id.*

II. Summary Judgment Review

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a) (2010). "A party asserting that a fact cannot be or is genuinely disputed must support the assertion by: (A) citing to particular parts of materials in the record ...; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). When no genuine issue of any material fact exists, summary judgment is appropriate. *See Shealy v. Winston*, 929 F.2d 1009, 1011 (4th Cir. 1991). The facts and inferences to be drawn from the evidence must be viewed in the light most favorable to the non-moving party. *Id.* However, "the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986).

III. Federal Habeas Review under 28 U.S.C. § 2254

Petitioner filed his petition after the effective date of the Antiterrorism and Effective Death

Penalty Act of 1996 ("AEDPA"). Therefore, in considering Petitioner's ineffective assistance of counsel claim, the Court's review is limited by the deferential standard of review set forth in 28 U.S.C. § 2254(d). *Lindh v. Murphy*, 521 U.S. 320 (1997); *Breard v. Pruett*, 134 F.3d 615, 618 (4th Cir. 1998). Under the AEDPA, federal courts may not grant habeas corpus relief unless the underlying state adjudication:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.

28 U.S.C. § 2254(d); *see also Evans v. Smith*, 220 F.3d 306, 312 (4th Cir. 2000) (explaining federal habeas relief will not be granted on a claim adjudicated on the merits by the state court unless it "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law," or "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding").

Discussion

In ground one, Petitioner argues that the offense to which he pled guilty (*heroin trafficking - first offense*) is not a lesser included offense of *heroin trafficking - second offense*, the charge for which Petitioner was indicted. The Magistrate Judge found that ground one was purely a matter of state law and therefore not cognizable in a petition for a writ of habeas corpus. This Court agrees.

A federal court "shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States." 28 U.S.C.A. § 2254(a).

Whether heroin trafficking (first offense) is a lesser included offense of heroin trafficking (second offense) does not implicate a federal right. As the Magistrate Judge noted, in South Carolina, the determination of whether an offense is a "lesser included offense" of the offense charged only affects the instructions given to a jury before deliberations. *See generally State v. White*, 605 S.E.2d 540, 542 (S.C. 2004). Petitioner has failed to demonstrate that he is in custody in violation of the Constitution or laws or treaties of the United States.

In his objections, Petitioner argues that ground one is an issue of federal law based on the U.S. Supreme Court opinion in *Schmuck v. United States*, 489 U.S. 705 (1989). However, *Schmuck* addresses the standard for determining when a *federal* crime is a lesser included offense under the Federal Rules of Criminal Procedure. *Schmuck* does not apply to Petitioner's case. Because ground one rests solely on an issue of state law and does not implicate a federal right, ground one is not cognizable on federal habeas review. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 ("federal habeas corpus relief does not lie for errors of state law . . . it is not the province of a federal habeas court to reexamine state-court determinations on state-law questions . . . a federal court is limited to deciding whether a conviction violated the Constitution, laws, or treaties of the United States."). The Magistrate Judge correctly applied the law to the facts and correctly concluded that Petitioner's claim in ground one was not cognizable on federal habeas review. Ground one is due to be dismissed.

As to grounds two and three, those claims were not raised on appeal from the denial of Petitioner's PCR application. As a result, the Magistrate Judge found that grounds two and three were procedurally barred. Petitioner responds that because the Court previously dismissed his case without prejudice for failure to exhaust state court remedies, the law of the case doctrine prevents

the Court from finding that grounds two and three of his current petition are procedurally barred. This argument is without merit. Nothing in the previous order prevents a finding in this case that Petitioner's grounds two and three are procedurally barred.

Petitioner failed to present grounds two and three to all appropriate state courts and would now be procedurally barred from raising the claims in state court. "If claims were not exhausted in state court but would now be procedurally barred if brought in state court, then federal courts can treat the claims as if they were procedurally defaulted in the state courts." *Clagett v. Angelone*, 209 F.3d 370, 378 (4th Cir. 370). "In all cases in which a state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 750 (1991). Petitioner has not demonstrated cause for the default or actual prejudice as a result of the alleged violation of federal law, nor has he demonstrated that failure to consider grounds two and three will result in a fundamental miscarriage of justice. The Court agrees with the Magistrate Judge that grounds two and three are procedurally barred and due to be dismissed.

Certificate of Appealability

A certificate of appealability will not issue absent "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When the district court denies relief on the merits, a prisoner satisfies this standard by demonstrating reasonable jurists would find the court's assessment of the constitutional claims is debatable or wrong. *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 336-38 (2003). When the district court denies relief on

procedural grounds, the prisoner must demonstrate both the dispositive procedural ruling is debatable and that the petition states a debatable claim of the denial of a constitutional right. *Slack*, 529 U.S. at 484-85. In this case, the Court concludes that Petitioner has not made the requisite showing of "the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

Conclusion

After reviewing the entire record, and for the reasons stated above and by the Magistrate Judge in the Report and Recommendation, the Court overrules Petitioner's objections [ECF No. 39] and adopts and incorporates by reference the Report and Recommendation [ECF No. 37] of the Magistrate Judge.

IT IS THEREFORE ORDERED that Respondent's motion for summary judgment [ECF No. 23] is **GRANTED**, and Petitioner's petition for writ of habeas corpus [ECF No. 1] is **DISMISSED with prejudice**. IT IS FURTHER ORDERED that a certificate of appealability is **DENIED** because Petitioner has not made "a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2).

IT IS SO ORDERED.

December 28, 2018
Florence, South Carolina

s/ R. Bryan Harwell
R. Bryan Harwell
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA

Gregory Green, Petitioner, vs. Donald Beckwith, *Warden*, Respondent.	)	C/A No. 0:17-2784-RBH-PJG **REPORT AND RECOMMENDATION**

Petitioner Gregory Green, a self-represented state prisoner, filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. This matter is before the court pursuant to 28 U.S.C. § 636(b) and Local Civil Rule 73.02(B)(2) (D.S.C.) for a Report and Recommendation on Respondent's motion for summary judgment. (ECF No. 23.) Pursuant to Roseboro v. Garrison, 528 F.2d 309 (4th Cir. 1975), the court advised Petitioner of the summary judgment and dismissal procedures and the possible consequences if he failed to respond adequately to Respondent's motion. (ECF No. 25.) Petitioner filed a response in opposition (ECF No. 27), and Respondent replied (ECF No. 28). Having carefully considered the parties' submissions and the record in this case, the court concludes that Respondent's motion should be granted and the Petition denied.

BACKGROUND

On November 21, 2013, Petitioner was indicted by an Horry County Grand Jury for trafficking in heroin, four to fourteen grams, second offense (2013-GS-26–4803). (App. at 70-71, ECF No. 24-1 at 72-73.) Petitioner retained Stuart Mark Axelrod, Esquire as counsel to defend the charge. (App. at 1, ECF No. 24-1 at 3.) On May 29, 2014, Petitioner pled guilty to trafficking in heroin, four to fourteen grams, *first offense*. (App. at 2, ECF No. 24-1 at 4.) The plea court

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sentenced Petitioner to ten years' imprisonment and a $50,000 fine. (App. at 18, ECF No. 24-1 at 20.) Petitioner did not appeal his conviction or sentence.

On November 17, 2014, Petitioner filed an application for post-conviction relief ("PCR") in the Horry County Court of Common Pleas. (App. at 21, ECF No. 24-1 at 23.) A hearing was held on the application on February 11, 2016 in which Petitioner was represented by James Falk, Esquire. (App. at 33, ECF No. 24-1 at 35.) The PCR court denied the application by order dated March 11, 2016. (App. at 62, ECF No. 24-1 at 64.)

Petitioner appealed the PCR court's order by filing a petition for a writ of certiorari in the South Carolina Supreme Court on October 24, 2016. (ECF No. 24-7 at 1.) Petitioner was represented by Wanda H. Carter, Esquire of the South Carolina Commission on Indigent Defense. (Id.) The Supreme Court denied the petition, and remittitur was issued on January 29, 2018. (App. at 24-9.) Petitioner filed this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 on October 13, 2017.[1]

FEDERAL HABEAS ISSUES

The Petition for a writ of habeas corpus raises the following issues, quoted verbatim:

Ground One: Under the elements test enunciated by the U.S. Supreme Court, S.C. Code Ann. 44-53-370(e)(3)(a), is not a lesser included of code 44-53-370(3)(a)2.

Supporting Facts: Petitioner was indicted by the Horry County grand jury on the charge of trafficking heroin, second offense pursuant to S.C. Code Ann. 44-53-370(e)(3)a2. (2013-GS-26-4803). The State recommended a plea to a lesser included offense of the offense charged in the indictment—trafficking, first offense pursuant to code 44-53-370(e)(3)(a)1. On May 29, 2014 five

[1] Respondent originally moved to dismiss or stay this case during the pendency of Petitioner's PCR appeal. (ECF No. 8.) However, Respondent withdrew the motion following the disposition of the appeal. (ECF No. 19.)

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minutes before being sentenced, petitioner signed the sentence sheet indicating a plea to a lesser included offense with a sentencing range between 9 to 12 years. Petitioner was sentenced to 10 years.

Ground Two: Petitioner contends he was deprived of sufficient notice of the charge to which he pled guilty in violation of the Due Process Clause of the 14th Amend. to the U.S. Constitution.

Supporting Facts: Petitioner was indicted by the Horry County grand jury for the offense of trafficking in heroin, pursuant to code 44-53-370(e)(3)(a)2. At the sentence proceeding held on May 29, 2014, the prosecutor, judge, and petitioner's attorney—all agreed to the amendment of the indictment. Petitioner did not waive presentment, nor was the offense included within the indictment. The misstatement applicable to the indicted offense, charged a distinct, unindicted offense. As a result, petitioner was deprived of sufficient notice of the charge in violation of his right under the Due Process Clause of the Fourteenth Amendment to the U.S. Const.

Ground Three: Petitioner contends the State breached the plea agreement which violated the Due Process Clause of the 14th Amend. to the U.S. Constitution.

Supporting Facts: Petitioner was indicted for trafficking in heroin, second offense, pursuant to S.C. Code Ann. 44-53-370(e)(3)(a)2. The State offered a plea agreement in which the State would (1) drop pending charges; (2) allow petition to plea to a lesser included offense charged in his indictment and (3) with a sentencing range between 9 to 12 years. Based on this offer and petitioner's failure to negotiate a better offer, petitioner decided to accept the plea agreement. On May 29, 2014 petitioner signed the sentence sheet and was sentenced to 10 years.

(Pet., ECF No. 1 at 5-8.)

DISCUSSION

A. Summary Judgment Standard

Summary judgment is appropriate only if the moving party "shows that there is no genuine dispute as to any material fact and the [moving party] is entitled to judgment as a matter of law."

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Fed. R. Civ. P. 56(a). A party may support or refute that a material fact is not disputed by "citing to particular parts of materials in the record" or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1). Rule 56 mandates entry of summary judgment "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

In deciding whether there is a genuine issue of material fact, the evidence of the non-moving party is to be believed and all justifiable inferences must be drawn in favor of the non-moving party. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986). However, "[o]nly disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

The moving party has the burden of proving that summary judgment is appropriate. Once the moving party makes this showing, however, the opposing party may not rest upon mere allegations or denials, but rather must, by affidavits or other means permitted by the Rule, set forth specific facts showing that there is a genuine issue for trial. See Fed. R. Civ. P. 56(c), (e); Celotex Corp., 477 U.S. at 322. Further, while the federal court is charged with liberally construing a petition filed by a *pro se* litigant to allow the development of a potentially meritorious case, see, e.g., Erickson v. Pardus, 551 U.S. 89 (2007), the requirement of liberal construction does not mean that the court can ignore a clear failure in the pleadings to allege facts which set forth a federal claim, nor can the court assume the existence of a genuine issue of material fact where none exists. Weller v. Dep't of Soc. Servs., 901 F.2d 387 (4th Cir. 1990).

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B. Habeas Corpus Standard of Review

In accordance with the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), claims adjudicated on the merits in a state court proceeding cannot be a basis for federal habeas corpus relief unless the decision was "contrary to, or involved an unreasonable application of clearly established federal law as decided by the Supreme Court of the United States," or the decision "was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding." 28 U.S.C. § 2254(d)(1), (2). When reviewing a state court's application of federal law, "a federal habeas court may not issue the writ simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly. Rather, that application must also be unreasonable." Williams v. Taylor, 529 U.S. 362, 410 (2000); see also White v. Woodall, 572 U.S. 415, ___, 134 S. Ct. 1697, 1702 (2014) (describing an "unreasonable application" as "objectively unreasonable, not merely wrong" and that "even clear error will not suffice") (internal quotation marks and citation omitted); Harrington v. Richter, 562 U.S. 86, 100 (2011); Humphries v. Ozmint, 397 F.3d 206 (4th Cir. 2005); McHone v. Polk, 392 F.3d 691 (4th Cir. 2004). Moreover, state court factual determinations are presumed to be correct and the petitioner has the burden of rebutting this presumption by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

"A state court's determination that a claim lacks merit precludes federal habeas relief so long as 'fairminded jurists could disagree' on the correctness of the state court's decision." Harrington, 562 U.S. at 101 (quoting Yarborough v. Alvarado, 541 U.S. 652, 664 (2004)); see also White, 134 S. Ct. at 1702 (stating that " '[a]s a condition for obtaining habeas corpus from a federal court, a state prisoner must show that the state court's ruling on the claim being presented in federal court was so

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lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement' ") (alteration in original) (quoting Harrington, 562 U.S. at 103). Under the AEDPA, a state court's decision "must be granted a deference and latitude that are not in operation" when the case is being considered on direct review. Harrington, 562 U.S. at 101. Moreover, review of a state court decision under the AEDPA standard does not require an opinion from the state court explaining its reasoning. See id. at 98 (finding that "[t]here is no text in [§ 2254] requiring a statement of reasons" by the state court). If no explanation accompanies the state court's decision, a federal habeas petitioner must show that there was no reasonable basis for the state court to deny relief. Id. Pursuant to § 2254(d), a federal habeas court must (1) determine what arguments or theories supported or could have supported the state court's decision; and then (2) ask whether it is possible that fairminded jurists could disagree that those arguments or theories are inconsistent with the holding of a prior decision of the United States Supreme Court. Id. at 102. "If this standard is difficult to meet, that is because it was meant to be." Id. Section 2254(d) codifies the view that habeas corpus is a " 'guard against extreme malfunctions in the state criminal justice systems,' not a substitute for ordinary error correction through appeal." Id. at 102-03 (quoting Jackson v. Virginia, 443 U.S. 307, 332 n.5 (1979) (Stevens, J., concurring in judgment)).

C. Exhaustion Requirements

A habeas corpus petitioner may obtain relief in federal court only after he has exhausted his state court remedies. 28 U.S.C. § 2254(b)(1)(A). "To satisfy the exhaustion requirement, a habeas petitioner must present his claims to the state's highest court." Matthews v. Evatt, 105 F.3d 907, 911 (4th Cir. 1997), abrogated on other grounds by United States v. Barnette, 644 F.3d 192 (4th Cir.

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2011); see also In re Exhaustion of State Remedies in Criminal and Post-Conviction Relief Cases, 471 S.E.2d 454, 454 (S.C. 1990) (holding that "when the claim has been presented to the Court of Appeals or the Supreme Court, and relief has been denied, the litigant shall be deemed to have exhausted all available state remedies."). To exhaust his available state court remedies, a petitioner must "fairly present[] to the state court both the operative facts and the controlling legal principles associated with each claim." Longworth v. Ozmint, 377 F.3d 437, 448 (4th Cir. 2004) (internal quotation marks and citation omitted). Thus, a federal court may consider only those issues which have been properly presented to the state appellate courts with jurisdiction to decide them. Generally, a federal habeas court should not review the merits of claims that would be found to be procedurally defaulted (or barred) under independent and adequate state procedural rules. Lawrence v. Branker, 517 F.3d 700, 714 (4th Cir. 2008); Longworth, 377 F.3d 437; see also Coleman v. Thompson, 501 U.S. 722 (1991). For a procedurally defaulted claim to be properly considered by a federal habeas court, the petitioner must "demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." Coleman, 501 U.S. at 750.

D. Respondent's Motion for Summary Judgment

Respondent argues that none of Petitioner's grounds for relief is cognizable in a federal habeas petition, and regardless, all of the claims are procedurally barred. The court agrees that Ground One is not cognizable, and that Grounds Two and Three are procedurally barred.

A district court may entertain an application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States. 28 U.S.C. § 2254(a);

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see also Estelle v. McGuire, 502 U.S. 62, 67-68 (1991) ("It is not the province of a federal habeas corpus court to reexamine state-court determinations on state-law questions."). In Ground One, Petitioner argues that the offense to which he pled guilty—trafficking in heroin, first offense—is not a lesser included offense of the offense for which he was indicted—trafficking in heroin, second or subsequent offense. In South Carolina, the determination of whether an offense is a "lesser included" of an offense charged only affects the instructions given to a jury before deliberations at trial. See generally State v. White, 605 S.E.2d 540, 542 (S.C. 2004). Thus, this issue is purely a matter of state law, and it does not implicate a federal right. See Estelle, 502 U.S. at 67-68. Petitioner cites to Schmuck v. United States, 489 U.S. 705 (1989) to argue that this is an issue of federal law, but Schmuck addresses the standard for determining when a *federal* crime is a lesser included offense under the Federal Rules of Criminal Procedure. Because Petitioner is challenging a state conviction, Schmuck is not applicable. Thus, Ground One of the Petition does not raise an issue of federal law that is cognizable in a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.[2]

In Ground Two, Petitioner argues he was not provided sufficient notice of the offense charged and to which he pled guilty because his indictment was amended at the plea proceeding, violating his right to due process. In Ground Three, Petitioner argues the State breached the plea agreement in violation of his right to due process. Such claims can sometimes be cognizable in a

[2] Respondent argues that Ground One is procedurally barred because it was not raised in Petitioner's direct appeal. The court recognizes that arguably a claim about lesser included offenses is an issue that should be raised to the trial court, and thus, is not cognizable in a PCR proceeding. See S.C. Code Ann. § 17-27-20. On the other hand, Petitioner raised this issue to the PCR court, including in a motion to alter or amend the judgment, and in his PCR appeal. Therefore, to the extent such a claim is cognizable in a PCR proceeding, the claim is not procedurally barred.

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federal habeas corpus petition. See Ashford v. Edwards, 780 F.2d 405, 407 (4th Cir. 1985) ("Variances and other deficiencies in state court indictments are not ordinarily a basis of federal habeas corpus relief unless the deficiency makes the trial so egregiously unfair as to amount to a deprivation of the defendant's right to due process."); Ashe v. Styles, 67 F.3d 46, 52 (4th Cir. 1995) (analyzing whether § 2254 petitioner was entitled to relief on his claim that the state prosecutor breached a plea agreement in violation of the petitioner's right to due process). However, these claims are procedurally barred. Petitioner raised these issues to the PCR court, including in a motion to alter or amend the judgment, but he did not raise them on appeal from the denial of his PCR application. Consequently, these claims were not preserved for review in the South Carolina Supreme Court. See McCray v. State, 455 S.E.2d 686, n.1 (S.C. 1995) (stating issues not raised in a petition for a writ of certiorari from the denial of a petitioner's PCR application are not preserved for appellate review). Because this claim was barred from consideration by a state rule of procedure, it cannot be raised in a § 2254 petition. See Lawrence, 517 F.3d at 714.

RECOMMENDATION

For the foregoing reasons, the court recommends Respondent's motion for summary judgment (ECF No. 23) be granted and the Petition be denied.

Paige J. Gossett
UNITED STATES MAGISTRATE JUDGE

August 8, 2018
Columbia, South Carolina

The parties' attention is directed to the important notice on the next page.